61629-3

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No. 61629-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JOSHUA HARRIS,
Respondent,

vs.

HONORABLE EDSONYA CHARLES, DIRECTOR OF KING COUNTY ADULT DETENTION and **CITY OF SEATTLE,**
Appellants.

REPLY BRIEF OF APPELLANTS

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A. REPLY ARGUMENT

1. Respondent has not established grounds for this court to dismiss this appeal.

a. This appeal is not moot as the trial court has jurisdiction to reimpose its sentence until August 16, 2010; even if this appeal is moot, the issue raised in this appeal should be reviewed as it is of continuing and substantial public interest.

Respondent contends that the City's appeal should be dismissed because it is moot and resentencing him would violate double jeopardy.

A case is not moot if a court can still provide effective relief.[1] This court plainly can provide effective relief by reversing the superior court's decision and upholding the trial court's original sentence. Inasmuch as respondent's sentence was suspended and he is on probation until August 16, 2010,[2] the trial court has jurisdiction over him at least until that date. Moreover, the trial court has

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[1] *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983) (review of a contempt finding against a juvenile was not moot even though he already had fully served his 30-day jail sentence because the fines imposed against him were still outstanding).

[2] *See* Appendix 1 to Brief of Respondent.

authority to modify respondent's sentence until that probation is terminated.[3]

Even if this appeal is moot, this court should review the issue raised in this case as it is of continuing and substantial public interest.[4] In determining whether a moot issue warrants review, the court considers whether the issue is of a public or private nature, whether an authoritative determination is desirable to provide future guidance to public officers and whether the issue is likely to recur.[5]

In *State v. Veazie*, relied on by respondent, the court determined that a moot issue concerning juvenile court sentencing was of continuing and substantial public interest that justified review. Just as the sentence that could be imposed for probation

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[3] RCW 35.20.255(1) provides in pertinent part that "[a]ny time before entering an order terminating probation, the court may modify or revoke its order suspending or deferring the imposition or execution of the sentence."

[4] *See Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994) (court considered moot issue of whether district court could deny bail to suspect arrested for domestic violence crime before first appearance); *State v. Veazie*, 123 Wn. App. 392, 397, 98 P.3d 100 (2004) (even though case was moot, court considered whether juvenile court statute allowed stacking of terms of confinement for violations of multiple disposition orders).

[5] *Westerman*, 125 Wn.2d at 286; *Veazie*, 123 Wn. App. at 397.

violations in juvenile court is more a public than a private matter,[6] so is the sentence that could be imposed on a criminal defendant in a court of limited jurisdiction. In *Westerman v. Cary*,[7] the court concluded that a moot issue concerning the denial of bail before first appearance in district court to suspects arrested for domestic violence crimes was a matter of public, rather than private, interest. The issue in this case is likewise of a public rather than private nature.

In *Veazie*,[8] the court determined that courts and attorneys needed guidance on the moot issue even though it already had been addressed by at least one published Court of Appeals decision. In *Westerman*,[9] the court also believed that guidance regarding an issue of wide application was both desirable and necessary. Judges and attorneys in courts of limited jurisdiction are at least equally in need of guidance on giving credit against a jail sentence for time on

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[6] *Veazie*, 123 Wn. App. at 397.
[7] 125 Wn.2d 277, 286-87. 892 P.2d 1067 (1994).
[8] 123 Wn. App. at 398.
[9] 125 Wn.2d at 287.

pretrial electronic home detention as no appellate decision has ever addressed this issue.

In *Veazie*,[10] the court concluded that the issue was likely to recur as it was, or appeared to be, unsettled. The issue in this case also is unsettled and is likely to recur. Even if the issue in this case is moot, it is a matter of continuing and substantial public interest that this court should decide.

b. The trial court's reimposition of its original sentence would not violate double jeopardy.

Respondent also contends that this appeal should be dismissed as he had a legitimate expectation of finality in his modified sentence and resentencing him would violate double jeopardy. A defendant's legitimate expectation of finality in the sentence may be influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination or the defendant's misconduct in obtaining the sentence.[11]

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[10] 123 Wn. App. at 399.

[11] *State v. Hardesty*, 129 Wn.2d 303, 311, 915 P.2d 1080 (1996).

Respondent has not completed his suspended sentence. Again, the trial court has jurisdiction over him until at least August 16, 2010. Respondent's claim that he has completed his sentence assumes that the superior court's order was correct – the very issue before this court for review. In *State v. Hardesty*,[12] relied on by respondent, the court held that a defendant had no legitimate expectation of finality in a sentence even though he had served his prison sentence and was not under community supervision when the state brought its motion for relief from judgment.[13] Respondent, who will be on probation for at least another 18 months, certainly has no more of an expectation of finality in his sentence than does a defendant who is not on probation at all.

The superior court granted respondent the relief he requested on April 7, 2008. The next morning, the trial court modified respondent's sentence in accordance with the superior court's order. The City filed its notice of appeal on May 5, 2008. In *Hardesty*,[14] the court held that the passage of almost one year after the defendant

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[12] 129 Wn.2d at 306 & 309-16.
[13] *Hardesty*, 129 Wn.2d at 306.

had been released from prison before the state sought to modify his sentence was not a sufficient passage of time to give him a legitimate expectation of finality in his sentence. In *State v. Traicoff*,[15] the court held that the passage of two years between the defendant's original erroneous sentence and his corrected sentence did not support a reasonable expectation that the original sentence was final. Respondent likewise could not obtain a legitimate expectation of finality in his modified sentence where review was sought less than 30 days later.

In *State v. Freitag*,[16] the court held that an appeal by the government of an erroneous sentencing decision puts the defendant on notice that his sentence is not final. The City timely appealed the superior court's decision in this case, which gave notice to respondent that his sentence was not final.

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[14] 129 Wn.2d at 316.

[15] 93 Wn. App. 248, 253-54, 967 P.2d 1277 (1998), *review denied*, 138 Wn.2d 1003 (1999).

[16] 127 Wn.2d 141, 145 n 3, 896 P.2d 1254, *amended by* 905 P.2d 355 (1995).

Respondent did not commit any misconduct in procuring his modified sentence. In *Traicoff*[17] and *State v. H.J.*,[18] the court held that the absence of fraud by a defendant in a sentencing proceeding does not necessarily establish a legitimate expectation of finality in an erroneous proceeding. Like the defendants' conduct in those cases, respondent's lack of misconduct does not create an expectation of finality.

Respondent contends that he had a legitimate expectation of finality in his modified sentence because the City did not seek a stay of the superior court's order. In *State v. Pringle*,[19] the court rejected the argument that the absence of a stay of an erroneous sentence prevented review of that sentence. Inasmuch as the municipal court complied with the superior court's order the morning after it was issued, seeking a stay would have been impractical, to say the least. Moreover, asking the superior court immediately to stay its order, which would have resulted in respondent serving the jail sentence that the superior court had just determined was unconstitutional,

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[17] 93 Wn. App. at 256.
[18] 111 Wn. App. 298, 305, 44 P.3d 874 (2002).

would have been pointless. The law does not require a futile act.[20] Neither the law nor the facts support respondent's argument that the City's decision not to seek a stay of the superior court's order established a legitimate expectation of finality.

Respondent also cites the government's inability to appeal an erroneous sentence as support for his claim of a legitimate expectation of finality in his modified sentence. Respondent chose to seek review of the trial court's original sentence by way of a writ of habeas corpus. He knew that the losing party to the writ could appeal as a matter of right.[21] Respondent now seems to want to avoid the consequences of his own decision. His conscious choice of a remedy that authorized this appeal by the City does not establish a legitimate expectation of finality.

Consideration of the factors identified in *Hardesty* as relevant to a defendant's legitimate expectation of finality in a sentence do not support respondent's position. He has not fully served his

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[19] 83 Wn.2d 188, 193, 517 P.2d 192 (1973).

[20] *State v. Austin*, 119 Wn. App. 319, 329, 80 P.3d 184 (2003).

[21] *See Honore v. Washington State Board of Prison Terms and Paroles*, 77 Wn.2d 660, 664, 466 P.2d 485 (1970); *Garfinkle v. Sullivan*,

suspended sentence, less than one month passed between the superior court's order to modify his sentence and the City's appeal and that appeal was promptly filed. The absence of a stay of the superior court's order and the inability, generally, of the government to appeal an erroneous sentence add nothing to respondent's argument. Respondent has not established that he had a legitimate expectation of finality in his modified sentence such that review of that sentence would violate double jeopardy.

2. Not giving respondent credit against his jail sentence for time on electronic home monitoring prior to sentencing does not violate double jeopardy or due process.

a. This court should not consider respondent's arguments regarding double jeopardy and due process that were not pleaded, argued or considered in superior court.

Respondent contends that the superior court's order that he be given credit against his jail sentence for time spent on electronic home monitoring prior to sentencing should be upheld on the basis

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37 Wash. 650, 651, 80 Pac. 188 (1905); *In re Sylvester*, 21 Wash. 263, 266, 57 Pac. 829 (1899).

of double jeopardy and due process.[22] Neither of these arguments was raised in respondent's Application for Writ of Habeas Corpus[23] or considered by superior court.[24] Nor does respondent claim that he argued either of these theories to the superior court.

The rule is that an appellate court can affirm a lower court's judgment on any ground within the pleadings and proof.[25] In *State v. Michielli,*[26] relied on by respondent, the court quoted and applied this rule and also cited *State v. Hudson*[27] for the proposition that an appellate court may affirm the trial court on any alternative theory argued to the trial court.[28] Inasmuch as respondent did not plead or argue double jeopardy or due process to superior court or otherwise

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[22] Respondent does not seem to make any separate due process argument on appeal.

[23] *See* CP at 1-16.

[24] *See* CP at 38-39.

[25] *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997) (Supreme Court upheld dismissal of charges on same basis used by trial court, even though Court of Appeals had upheld dismissal on different ground); *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989)

[26] 132 Wn.2d at 242-43.

[27] 79 Wn. App. 193, 900 P.2d 1130 (1995), *affirmed*, 130 Wn.2d 48, 921 P.2d 538 (1996).

[28] *See also State v. Carter*, 127 Wn.2d 836, 841, 904 P.2d 290 (1995) (noting obvious due process problems in affirming a trial court

give notice to appellants that he would be raising these theories, this court should not consider them.

b. Electronic home monitoring imposed as a condition of release prior to trial is not punishment for purposes of double jeopardy.

For a sanction to violate double jeopardy it must be punishment,[29] which determination is made by examining any legislative indication of a punitive purpose and whether the sanction is so punitive as to be transformed into a criminal penalty.[30]

The purpose of CrRLJ 3.2(b)(6) & (d)(9), which authorize electronic home monitoring prior to trial, is to assure the presence of the accused at future court hearings and prevent him from committing a violent offense, intimidating witnesses or interfering with the administration of justice. Conditions of pretrial release are not intended as punishment.[31] A defendant on electronic home monitoring generally is confined to his home, but may be allowed to

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ruling in a criminal proceeding on an alternative theory against which the appellant had no opportunity to present argument).

[29] *In re Personal Restraint of Metcalf*, 92 Wn. App. 165, 177, 963 P.2d 911 (1998), *cert. denied*, 527 U.S. 1041 (1999) (deductions from prison inmate's received funds for incarceration costs and crime victim's compensation fund not punishment).

[30] *Metcalf*, 92 Wn. App. at 178.

leave for treatment sessions or medical appointments or to go to work.[32] A defendant on electronic home monitoring certainly might believe such a restriction is punitive, but whether a sanction constitutes punishment is not determined from the defendant's perspective.[33] Neither the purpose nor the effect of electronic home monitoring prior to trial is punitive.

Respondent's reliance on cases addressing whether *incarceration* prior to trial is punishment and whether a defendant must be given credit for pretrial *incarceration* against his jail sentence is seriously misplaced as this case concerns electronic home monitoring. Contrary to respondent's claim that "[u]nder any definition, electronic home detention qualifies as detention and punishment,"[34] *State v. Perrett*[35] held that a defendant on electronic

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[31] *State v. Heslin*, 63 Wn.2d 957, 960, 389 P.2d 892 (1964) (bail).

[32] *See* http://www.ci.seattle.wa.us/courts/comjust/EHM.htm (outlining electronic home monitoring offered by Seattle Municipal Court). Respondent offered no evidence to superior court regarding the exact nature of his electronic home monitoring restriction, which is another reason that the double jeopardy issue should not considered for the first time in this court.

[33] *State v. McClendon*, 131 Wn.2d 853, 866-67, 935 P.2d 1334, *cert. denied*, 522 U.S. 1027 (1997).

[34] Brief of Respondent, at 21.

home detention was not "detained" for purposes of the time for trial rule. As the court noted in that case, electronic home monitoring eliminates the hardships associated with incarceration – a defendant is free to live as he had before being charged, he is not hindered in preparing his defense and he suffers neither the stigma nor the discomfort of jail.[36] In addition, *Bremerton v. Bradshaw*[37] held that a court of limited jurisdiction is not required to credit pretrial electronic home monitoring against a jail sentence. Electronic home monitoring simply is not the same as incarceration.

Even if this court considers respondent's double jeopardy and due process arguments, he has not demonstrated that pretrial electronic home monitoring is punishment. As discussed in appellant's opening brief, respondent did not sustain his burden of proving that equal protection requires that he be given credit against his jail sentence for the time on electronic home monitoring before sentencing. The superior court erred by concluding otherwise.

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[35] 86 Wn. App. 312, 317-19, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997).

[36] *Perrett*, 86 Wn. App. at 318-19.

B. CONCLUSION

Based on the foregoing argument, the superior court's decision ordering Seattle Municipal Court to give respondent credit against his DWLS 3rd degree jail sentence for the time on electronic home monitoring before sentencing should be reversed and respondent's petition for writ of habeas corpus should be dismissed.

Respectfully submitted this 20th day of February, 2009.

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[37] 121 Wn. App. 410, 413, 88 P.3d 438 (2004), *review denied*, 153 Wn.2d 1012 (2005).